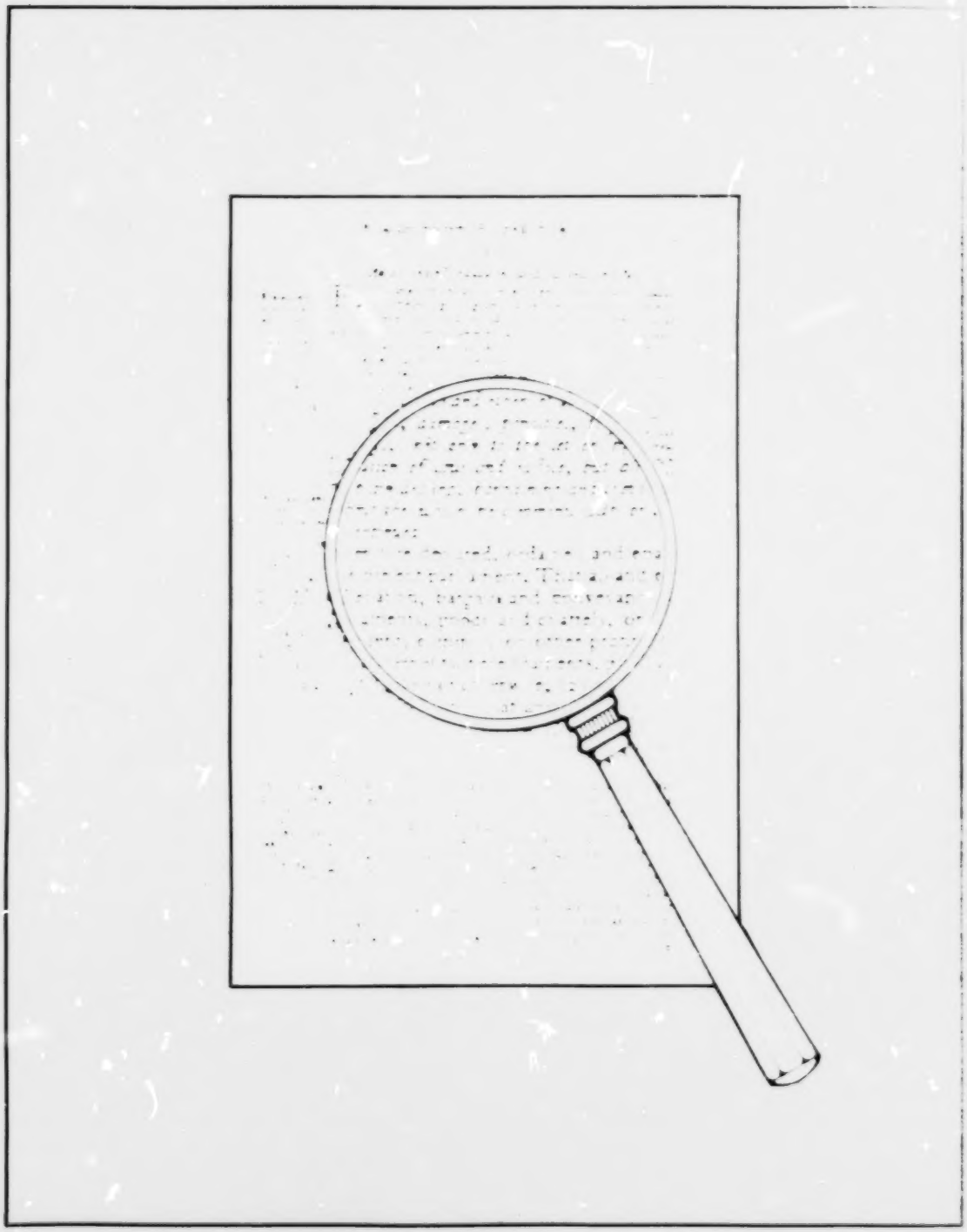
Law Reform
Commission of
Saskatchewan

Proposals Relating to the Rules Against Perpetuities and Accumulations

Report to the Minister of Justice

Saskatchewan



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PROPOSALS RELATING TO THE RULES AGAINST PERPETUITIES AND ACCUMULATIONS

Law Reform Commission of Saskatchewan
Saskatoon, Saskatchewan

Report to the Minister of Justice

June, 1987

The Law Reform Commission of Saskatchewan was established by *An Act to Establish a Law Reform Commission*, proclaimed in November, 1973, and began functioning in February of 1974.

The Commissioners are:

Professor Douglas A. Schmeiser, Q.C., B.A., LL.B., LL.M., S.J.D., Chairman

Madam Justice Marjorie A. Gerwing of the Saskatchewan Court of Appeal

Mr. Gordon J. Kuski, Q.C., LL.B.

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The Law Reform Commission Act

6. The commission shall take and keep under review all the law of the province, including statute law, common law and judicial decisions, with a view to its systematic development and reform, including the codification, elimination of anomalies, repeal of obsolete and unnecessary enactments, reduction in the number of separate enactments and generally the simplification and modernization of the law.

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Saskatchewan

Law Reform
Commission of
Saskatchewan

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The Honourable Bob Andrew,
Minister of Justice,
Province of Saskatchewan,
REGINA, Saskatchewan.

Dear Mr. Minister:

The Rule Against Perpetuities and the related Rule against Accumulations constitute a complex and technical body of law designed to meet the needs of a bygone era. Today, the Rules are often a source of "pitfalls for the unwary", and unpredictable in impact. On occasion, discovery of a perpetuities problem has led to protracted and expensive litigation from which no one really benefits.

The very complexity of the Rules may have served as a disincentive to review them. Nevertheless, Alberta, British Columbia, and Ontario have attempted to reform the Rules, and Manitoba has abolished them. The Commission, after an examination of the Rules as they apply in Saskatchewan, has also concluded that they should be abolished.

Pursuant to section 9 of The Law Reform Commission Act, the Commission submits its report entitled "Proposals Relating to the Rules Against Perpetuities and Accumulations."

Respectfully submitted this third day of June, A.D. 1987.

D.A. Schmeiser

Douglas A. Schmeiser, Q.C.,
Chairman.

Madam Justice Marjorie A. Gerwing,
Commissioner.

Gordon D. Kuski, Q.C.,
Commissioner.

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I. INTRODUCTION

A. The Rule Against Perpetuities

> No interest [in property] is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the instrument.
> — Professor John Chipman Gray.[1]

The rule against perpetuities is perhaps the most notorious example of "lawyers' law". It is a complex and technical body of law apparently beyond the grasp of most laymen, and not a few lawyers. Nevertheless, it can produce striking and unexpected results when applied to a wide range of private legal matters, including wills, trusts and even options to purchase land. Professor Gray, writing in the late nineteenth century, was of the opinion that "the rule against perpetuities has grown to fit the ordinary dealings of the community. It is a well-established, simple and clear rule."[2] Few commentators today are as enthusiastic about it. Far from being an instrument of reasonable social policy, the rule is often seen as a source of "pitfalls for the unwary"[3], destructive of the intent of testators and unpredictable in its impact.

Morris and Leach, authors of the leading modern textbook on the rule, are able to defend it only to the extent that they are willing to "conclude that on the whole the rule does more good than harm, though the policy considerations underlying it are much weaker than they were 300 or 100 years ago."[4] Following the advice of Morris and Leach, the rule has been reformed in Britain, three Canadian provinces, and several American and Australian jurisdictions.[5] But many practising lawyers and legal scholars are less kind to the rule than Morris and Leach. They regard it simply as an irrelevancy — essentially yesterday's device for solving yesterday's problems.[6] Manitoba, following the recommendations of the province's Law Reform Commission, has recently abolished the rule in its entirety.[7]

Gray identified the community interest served by the rule against perpetuities as "forwarding the circulation of property".[8] The rule was devised in the late seventeenth century, when family settlements designed to keep property within aristocratic families from generation to generation came into vogue. In a society in which wealth and status were bound up with land ownership, it was perhaps to be expected that the aristocracy would seek to protect its fortunes against improvident heirs and their creditors. Attempts to do so effectively prevented the encumbrance or alienation of land for substantial periods of time. The courts thought it necessary to place some restraint on schemes that tie up land "in perpetuity".

Lord Nottingham, in the decision which established the rule in something like its modern form, castigated "remainders [which] must continue as perpetual clogs upon the estate". Such remote interests, he suggested, "do fight against God, for they pretend to such a stability in human affairs, as the nature of them admits not of, and they are against the reason and policy of the law, and therefore not to be endured." On the other hand, he found future interests acceptable "if they be not of remote or long

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[1] John Chipman Gray, *The Rule Against Perpetuities* (4th ed.), (1942), p. 191. The first edition was published in 1886.

[2] *Ibid.*, p. 756.

[3] W. Barton Leach and James K. Logan, *Future Interests and Estate Planning*, (1962), p. 670.

[4] J.H.C. Morris and W. Barton Leach, *The Rule Against Perpetuities* (2nd ed.), (1962), p. 18.

[5] See Ontario: *The Perpetuities Act*, 1966, S.O. 1966, c. 113; Alberta: *The Perpetuities Act*, S.A. 1972, c. 121; British Columbia: The *Perpetuities Act*, S.B.C. 1975, c. 53. The rule was reformed in the United Kingdom in 1964, Western Australia in 1962, Pennsylvania in 1947, Massachusetts in 1954, Vermont in 1957, and Kentucky in 1960.

[6] The Manitoba Law Reform Commission, *Report on the Rules Against Accumulations and Perpetuities*, Report No. 49, February 12, 1982, p. 41, summarizing the views of those who would abolish the rule. The leading exponent of abolition in Canada is Professor Donovan Waters, author of the influential textbook, *The Law of Trusts in Canada*, and a consultant to the Manitoba Commission on its Perpetuities Project.

[7] *The Perpetuities and Accumulations Act*, R.S.M. 1982-83-84, c. 43.

[8] Gray, *supra*, note 1, p. 5.

consideration, but such as by a natural and easy interpretation would speedily wear out, and so things come into their own channel again".[9]

The rule against perpetuities was designed to strike a balance between the aristocracy's ambitions for its descendants and the commercial reality of a market economy in which land ought to be traded like any other commodity. The rule did so by focusing on the concept of the "vesting" of future interests.

English real property law, inherited by all common law jurisdictions, recognizes future interests or estates in land. Today, future interests are most often created by the terms of a trust or will, but they may also be created in other ways.[10] A grant of the future interest gives the purchaser or donee an interest in the land that may be enforced by proprietary remedies; it is the right of possession that is withheld until the stipulated event which causes the future interest to fall into possession.

A future interest may be either vested or contingent. An interest vests when the person holding the interest will obtain possession upon the expiration of the preceding interest. Thus, for example, if a life estate is granted to A with remainder to B, B's interest is vested because B or his heirs will be entitled to possession upon the death of A. A future interest is contingent if there is some condition that has not yet been fulfilled which may prevent the future interest from ever falling into possession. Thus, for example, if property is left in trust to A upon obtaining the age of majority, A's interest is contingent until he reaches the age of eighteen.[11]

The rule against perpetuities, although its justification appears to be primarily to render property freely alienable, operates by striking down interests which will vest only at some remote point in time.[12]

Traditionally, English land law measured the duration of estates in terms of lives. It was natural for the judges who formulated the rule against perpetuities to measure the perpetuity period in lives, with the addition of a period of minority in order to save future interests taking effect on the age of majority that would otherwise be too remote. Lord Nottingham was content in 1682 merely to lay down the proposition that remote interests might fail without defining the notion of remoteness.[13] He did, however, make it clear that there could be no objection if vesting occurred during the lifetime of some person interested in

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[9] *The Duke of Norfolk's Case* (1682), 3 Ch. Cas. 1.

[10] A future interest in real property can, of course, be created without the trust mechanism. Legal future interests are, however, somewhat anomalous under the land titles system. Nothing in the Saskatchewan *Land Titles Act*, R.S.S. 1978, c. L-5 precludes transfer of such an interest within the system. Section 90(1) provides that ". . . every instrument transferring land shall operate as an absolute transfer of all such right and title as the transferor has in the land at the time of its execution, unless a contrary intention is expressed in the transfer." Nevertheless, the scheme of the Act appears to assume that registered interests will be fee simples, and no provision is made in the statutory form of transfer (Form J) for transfer of any interest other than a fee simple. Therefore, as a matter of practice, lesser estates are invariably created by trust. It would also presumably be possible to convey a legal interest outside the land titles system, and protect it by caveat.

Future interests in personal property can be created by trust, though it may also be possible to create legal future interest in personal property as well. See Gray, *supra*, Appendix F, note 1.

[11] On the concept of vesting generally, see H.D. Anger and J.D. Honsberger, *Canadian Law of Real Property*, (1959), 125ff.

[12] Professor Gray quite correctly noted that the name of the rule is something of a misnomer. He suggested that the rule should have been styled a "rule against remoteness", rather than a rule against perpetuity (Gray, *supra*, note 1). But as Armour has pointed out:

> . . . [T]he rule is directed against rendering property perpetually inalienable or inalienable for an indefinite time; and whether that is attempted by direct limitation, or indirectly by creating future executory interests and holding them in suspense, is immaterial (*The Law of Real Property*, (2nd ed.), (1916), p. 239).

The common law prohibited restraints on alienation of land before the rule against perpetuities was devised. The rule can be seen, in fact, as an attempt to prevent testators from doing indirectly through the creation of successive contingent interests what could not be done directly. See generally on the history of the rule, Gray, *supra*, note 1, c. 5. It should also be noted that at common law, contingent interests could not be assigned. Equity, however, was willing to enforce conveyance of a contingent interest made for valuable consideration, and by the *Real Property Act*, 8 & 9 Vict., c. 106, s. 6, all future interests were recognized as assignable.

[13] *The Duke of Norfolk's Case*, *supra*, note 9.

the property who was alive at the time the interests were created. In the eighteenth century, the perpetuity period applicable to a particular interest was held to be a life in being and the minority of the taker.[14] In *Thellusson* v. *Woodford*, the court permitted extension of the perpetuity period, if necessary to save a grant, by one or more periods of gestation.[15] Finally, in *Cadell* v. *Palmer* in 1833, the so-called "modern rule against perpetuities" took its final form. In that case, the perpetuity period was set at 21 years after the life in being, whether a minority was involved or not, with gestation periods if necessary.[16]

No doubt, in the seventeenth and eighteenth centuries, a rule restraining the tendency of testators and settlors to attempt control of intergenerational land transfers "in perpetuity" was necessary. The cost, however, was a complex and difficult body of law. Professor Gray required almost 900 pages to explain the rule against perpetuities, and even he was forced to admit "that I have done all my sums correctly, I do not venture to hope. There is something in the subject to facilitate error".[17] In practice, it is not always easy to determine when interests created in complicated trust arrangements vest, or to identify the lives in being relevant to those interests.

The unreformed rule against perpetuities invites further difficulty because it will strike down a future interest if there is any possibility at all that it will vest outside the perpetuity period; thus even if an interest will vest outside the period only in the event that the infamous "fertile octogenarian" gives birth, the rule operates to void the interest *ab initio*.[18] This "doctrine of possibilities" has naturally attracted the attention of reformers[19], but the pitfalls created by the rule are too varied to be cured by any simple modification.

Moreover, although the rule was devised in the context of settlements of land, it has been applied, as the Manitoba Law Reform Commission points out, "almost randomly" to other interests in property. A review of reported Saskatchewan decisions indicates that most of the perpetuity problems that have come before the courts in the province have involved options to purchase.

The social conditions which gave rise to the rule against perpetuities no longer exist. In a modern estate practice, a lawyer is rarely called upon to draw an instrument creating interests in persons any more remote from the testator than his children, or occasionally his grandchildren. The Manitoba Law Reform Commission made the observation that:

> It is an odd fact that among a gathering of practitioners mention of the rule against perpetuities always evokes smiles. It seems that the rule is associated in many lawyers' minds with the academic world. It is a rule which is no doubt educationally of value, but surely something of limited real significance for the busy practitioner. Lawyers who attend wills and trusts section meetings, and those who specialize in estate planning and administration of estates seem often to hold views which are not very different. And . . . they make the comment that the likelihood of their today drawing trusts where vesting "of all things — I thought you meant trust termination" will not occur within the span of all the possible lives in being, plus 21 years, is about as likely as the abolition of taxation.[20]

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[14] *Stevens v. Stevens* (1736), Cas. Tem.

[15] (1805), 11 Ves. 112.

[16] (1833), 6 E.R. 956 (H.L.). Although the 21 year component of the perpetuity period was adopted because interests under wills and trusts often remain contingent until the age of majority, it is now independent of the age of majority. Therefore, it would appear that the perpetuity period has not been affected by legislation reducing the age of majority.

[17] Gray, *supra*, note 1, xi.

[18] See, for example, the often cited case of *Jee* v. *Audley* (1787), 1 Cox. Eq. 324, in which an interest was held to be void because of the possibility that a 70 year old woman might yet give birth.

[19] See below, p. 29.

[20] The Law Reform Commission of Manitoba, *supra*, note 6, p. 28.

But perpetuities problems do continue to arise. That they do is not so much because a handful of testators and settlors still insist upon creating complicated intergenerational trusts, but because the rule can have unexpected consequences. A busy practitioner who adapts a clause in a perfectly valid will for use in another trust document, making what seem to be perfectly straightforward modifications to suit the new purpose, may unwittingly fall into perpetuities trap.

The rule against perpetuities has been considered in only a handful of reported Saskatchewan decisions. But that fact perhaps increases the danger that the rule will be infringed. Otto Lang, who recommended virtual abolition of the rule in 1962, has written that:

> [The rule] is not often relevant to the day to day work of barristers and solicitors in Saskatchewan. For this reason, it is neglected by law school and lawyer alike and there is an increase in the odds that problems involving the rule are dealt with as though the rule did not exist. This creates an explosive situation in leaving alive claims for the correction of errors in the disposition of property. Sooner or later such situations will be exposed and donors' intentions will be frustrated when the rule is seen to apply, although the conveyancer did not realize that it would.[21]

When a perpetuities trap is sprung, a testator's intentions are defeated and a beneficiary is deprived of a bequest. If a trustee distributes property in accordance with a will or trust, but in contravention of the rule, the person entitled to the property in law will have a right of action against the beneficiary who received the property, the trustee, and the lawyer who advised the trusee. As Otto Lang has observed:

> . . . [T]his may follow even though everyone might admit that the property went to the person intended by the testator to receive it and went there without any inconvenience to property holding in Saskatchewan or to the general commercial world. In fact, everyone might further be prepared to state that to give it to the person who claims it because of the perpetuity rule would be doing injustice as well as going against the intentions of the testator.[22]

Leach and Logan, editors of a standard American casebook on estate planning, preface a series of cases on the rule with the comment that:

> No one can read the perpetuity cases in this part without some sense of nausea. Ninety-nine percent of them show perfectly innocent dispositions where the peculiarities of the rule either cause gifts to fail or produced wasteful litigation.[23]

In fact, the rule is quite capable of producing litigation that benefits no one. Leach and Logan provide extensive commentary on a celebrated Massachusetts case, *Sears* v. *Coolidge*,[24] that serves as eloquent testimony to the pernicious impact the rule can have on the apparently staightforward intentions of a settlor.

In 1913, Thomas Jefferson Coolidge, a prominent Boston merchant and entrepreneur, settled his modest fortune on his family by way of an *inter vivos* trust. The trust, devised by an equally prominent Boston lawyer, Philip Dexter, was designed to avoid succession duties (the state of Massachusetts levying

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[21] Otto Lang, "A Perpetuities Act for Saskatchewan", *The Canadian Bar Review* (1962), vol. 40, p. 294.

[22] *Ibid.*, at 299.

[23] Leach and Logan, *supra*, note 3, p. 671.

[24] 108 N.E. (2nd) 563 (Supreme Judicial Court of Massachusetts), 1952.

no gift tax on *inter vivos* settlements at that time). Apart from adoption of the *inter vivos* form, there was nothing particularly unusual about the Coolidge trust. It was a typical family settlement of the sort in fashion among proper Bostonians at the turn of the century. Certainly, there was little reason in 1913 to suspect that the trust would spawn litigation that was not finally resolved until 1952.

The precise nature of the problem need not be recited here, but it is worth noting that the trust was first challenged on other grounds by the State Department of Revenue. It would have been in the interest of the tax collectors to overturn the trust so that the funds would revert back to the testator's (taxable) estate. The perpetuities problem was subtle enough that it was not recognized at that time; it may have first been recognized by a grandson of the testator while studying property law at Harvard University.

The problem was eventually rediscovered by a solicitor for a trust company that had become executor of the estate of one of the beneficiaries under the Coolidge trust. The company felt itself bound by its fiduciary duty to the estate it represented to initiate proceedings, and was quickly joined by the Revenue Department. None of the beneficiaries under either the *inter vivos* trust or the Coolidge will had a clear interest in overturning the trust. Leach and Logan suggest that "the imponderables were truly incapable of being weighed. The computations would baffle UNIVAC." They note that "the family members were determined to follow the terms of the 1913 trust and there was much discussion of what renunciation or inter-family gifts would be necessary to nullify the effects of any adverse decision by the Supreme Judicial Court", but once the issue was raised "there was nothing to be done to stem the flood of income, estate, inheritance and gift tax litigation in the federal courts and in at least three states."[25]

The ensuing litigation produced years of uncertainty, and even hardship for some of the infant beneficiaries of the trust. The legal fees, estimated by Leach and Logan as less than five percent of the funds in dispute, were reasonable, but the lawyers may have been the only real beneficiaries of the dispute. In the end, the Massachusetts Supreme Court held that the trust did not infringe the rule against perpetuities. It had taken literally decades of negotiation and litigation to determine whether a rule that had been part of the common law since 1682 was applicable to the trust. Leach and Logan conclude their discussion of the case with the observation that "surely the legal profession can adequately support itself by enterprises more constructive than this one."

In Saskatchewan, there has been no perpetuities case comparable to *Sears* v. *Coolidge*, but the rule has produced some protracted litigation. In *Prudential Trust Company* v. *Forsythe*, a vaguely worded option clause in a petroleum and natural gas lease gave rise to a perpetuities problem. The lease was signed in 1951, and the litigation began in 1953. It was not until 1960 that the issue was finally resolved in the Supreme Court of Canada.[26]

The case for retention of the rule against perpetuities rests on the assumption that there still is a valid social purpose to be served by prohibiting perpetual clogs on the alienability of property. Although such schemes are rare at present, it is argued that some defence must be available in the event that a testator or settlor with peculiar notions undertakes to implement them. No doubt, the law should provide some protection against attempts to create perpetuities. The question, however, should not be whether such protection is required, but whether the rule against perpetuities is the most appropriate vehicle for implementing that policy. Reform of the rule has addressed some of its obvious inadequacies. In particular, all jurisdictions that have reformed the rule have provided that no interest will fail unless it actually vests outside the perpetuity period, and most have provided additional protection against the fertile octogenarian[27] and some other troublesome aspects of the rule.[28] Nevertheless, the reformed rule

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[25] Leach and Logan, *supra*, note 3, pgs. 785-807.

[26] [1960] S.C.R. 227.

[27] See, for example, *The Perpetuities Act*, (Ont.), *supra*, note 5, sections 3 and 4 ("wait and see" principle introduced), note 5.

[28] E.g., *ibid*, s. 7 (Octogenarians no longer assumed fertile).

cannot, by its very nature, eliminate all of the problems that exist under the common law. A British Columbia law professor, commenting on the Province's *Perpetuities Act*, concluded that "[the act] has removed the traps which abound in the common law . . . [but] the Act has not made any simpler a technical and complex area of the law."[29]

If mechanisms are available to prevent the creation of perpetuities that do not depend on the inevitably difficult notion of remoteness of vesting, abolition of the rule would be preferable to reform. The Manitoba Law Reform Commission's *Report on the Rule Against Accumulations and Perpetuities* was a new departure in the approach of law reform agencies to the rule. The report drew attention to the impact of variation of trusts legislation on the perpetuities problem. Such legislation was first adopted in England in 1958, and has subsequently been enacted in most Commonwealth jurisdictions.[30] Under *The Variation of Trusts Act*, the court can consent to an arrangement to vary or revoke a trust put forward by capacitated beneficiaries. Thus, as the Manitoba Commission notes, under the new regime of trust law created by the legislation, "it is not the testator who controls the future, but the judge who decides today (when that future has come) whether a sufficient case can be made out for an arrangement which can revoke the trust."[31]

The Manitoba Law Reform Commission has drawn the obvious conclusion. It argues that properly formulated variation of trust legislation makes the rule against perpetuities unnecessary. If the rule is abolished, no effort to create a perpetuity will be successful within a trust context if the beneficiaries can demonstrate to the court that the trusts imposed by the settlor have operated for an unreasonably long period of time.[32]

B. The Rule Against Accumulations

The rule against accumulations is essentially a statutory extension of the rule against perpetuities. Under the rule against perpetuities, income accumulating in a trust fund will be subject to the rule if it does not vest in a beneficiary within the perpetuity period. Early nineteenth century English legislators, however, believed that the rule against perpetuities provided inadequate protection against long-term accumulation of income. *The Accumulations Act*[33] placed limits on the time during which income might be accumulated. With certain exceptions, the legislation limits accumulation to 21 years or the minority of beneficiaries.

The policy underlying *The Accumulations Act* appears to have been a fear that accumulation trusts might swallow up a significant part of the wealth of the nation, effectively taking it out of circulation for long periods of time. Whether the apprehension of legislators in 1800 was well founded or not, accumulation trusts cannot be regarded as a significant threat to economic well-being today.

The legislation was re-enacted in several provinces which did not receive it as part of their law,[34] and has been held to be in force in Saskatchewan.[35] But it has been of little practical significance in the province, providing the subject matter for litigation in only a single reported decision.[36]

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[29] A.J. McClean, "The British Columbia Perpetuities Act — a Primer", (1979) 13 U.B.C. Law Rev. 240.

[30] *The Variation of Trusts Act*, R.S.S. 1978, c. V-1.

[31] The Manitoba Law Reform Commission, *supra*, note 6 , p. 45.

[32] *Ibid.*, pgs. 54-57.

[33] (1800), 39 & 40 Geo. 3, c. 98.

[34] E.g. Ontario — *The Accumulations Act*, R.S.O. 1960, c. 4.

[35] *Re Fossum* (1960), 32 W.W.R. 372 (Q.B.).

[36] *Ibid.*

The Accumulations Act has been reformed in Ontario, and declared inoperative in Manitoba, Alberta and British Columbia.[37]

C. The Commission's Approach

The Commission has concluded that neither the rule against perpetuitites nor the rule against accumulations are necessary in Saskatchewan. Chapter II of this report critically analyzes the rule against perpetuities in sufficient detail to identify the problems created by its operation. Reform of the rule in other jurisdictions is also examined in order to justify abolition rather than reform. Chapter III elaborates the Commission's reasons for recommending repeal of *The Accumulations Act*, and Chapter IV briefly discusses the archaic rule in *Whitby* v. *Mitchell*, a perpetuity rule established before th so-called "Modern Rule against Perpetuities" took shape.

In the Commission's opinion, the policy considerations underlying the rule against perpetuities can be adequately achieved by application of *The Variation of Trusts Act*. But if variation of trusts legislation is relied upon to replace the rule, it will be necessary to modify it in certain respects. For example, the rule applies to future interests created other than by trust. Although future interests are rarely created outside a trust context in Saskatchewan, some method to bring such interests within the scope of variation of trusts legislation will be necessary if the rule is abolished. Chapter V of this report analyzes the way in which *The Variation of Trusts Act* will apply to future interests created by trust if the rule is abolished, and formulates the amendments to that Act that will be necessary to extend the its ambit to other future interests.

II. THE RULE AGAINST PERPETUITIES: A CRITICAL SURVEY

A. The Rule As Applied to Wills and Trusts

1. Introduction

Since the trust is the most common mechanism for creating interests in property in succession, it is the most obvious source of perpetuities problems. A will leaving property to grandchildren upon the age of majority provides the most common contemporary example of interests vesting in future generations. A straightforward bequest benefitting two generations will usually not create a perpetuities problem, but a similar grant made *inter vivos*, or subject to conditions other than obtaining the age of majority, though less frequently encountered in practice, is more apt to infringe the rule.[38] A perpetuities problem is perhaps most commonly created when a precedent is modified to meet the particular needs of a testator with unusual requirements. Tax planning, which may require the creation of relatively complicated trust arrangements, may also lead a settlor and his legal counsel unwittingly into a perpetuities trap.[39]

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[37] *The Accumulations Act*, R.S.O. 1980, c. 5; *The Perpetuities Act* (Alberta), *supra*, note 5, s. 4; *The Perpetuities Act* (B.C.), *supra*, note 5, s. 24; *The Perpetuities and Accumulations Act* (Man.), *supra*, note 7, s. 2.

[38] See below, p. 24.

[39] See, for example, *Harris v. M.N.R.*, [1966] S.C.R. 489.

2. The Rule at Common Law

Although it is not always clear when interests vest,[40] the basic conceptual problems in applying the rule against perpetuities to trusts are bound up with measurement of the perpetuity period. The "life in being" referred to in the rule is literally that of anyone alive at the time the interests in question are created, but it is only those lives that directly or indirectly affect the time when interests vest that will determine whether the rule applies. Applications of the rule is thus largely a matter of searching for hypothetical sequences of births and deaths which might cause an interest to vest outside the perpetuity period.

Usually, the relevant lives will be those of beneficiaries. For example, if a gift is made to A (a living person) for life, and then to B (a person who has not yet been born) upon reaching the age of majority, the perpetuity period will terminate 21 years after the death of A. Occasionally, however, a life in being is specified by implication. Thus, for example, if a gift is made to grandchildren, their parents will be potential lives in being.[41] Since grandchildren must be born during the lifetimes of their parents, the lives of the parents are a factor determining the length of the perpetuity period. It should also be noted that it was once common to establish an artificial perpetuity period using a "royal lives clause", providing for distribution of an estate 21 years after the death of the living descendants of the monarch reigning at the time the interests were created.[42]

Because lives in being are ascertained at the time when the instrument creating the interests in question takes effect, the form of the instrument may affect the identity of the relevant lives in being. An *inter vivos* trust takes effect on the date the instrument is made. Section 21 of *The Wills Act*, on the other hand, provides that:

> Unless a contrary intention appears by the will, every will shall be construed, with reference to the real and personal property comprised in it, to speak and take effect as if it has been executed immediately before the death of the testator.[43]

This difference in treatment of wills and *inter vivos* trusts has, perhaps, been as productive of perpetuities problems as any other single factor. Consider, for example, a grant of a beneficial interest to the settlor's children for life, with remainder to grandchildren upon obtaining the age of majority. If the grant is made by will, the lives in being are ascertained at the date of the settlor's death. Since no more children can be born to the settlor, all his surviving children are lives in being. All grandchildren will obtain the age of majority within 21 years of their parents' death. There is, in the result, no perpetuities problem. But if the same grant is made by *inter vivos* trust, a perpetuities problem will be created. Since the settlor is alive at the time the trust takes effect, there is a possibility that one of the settlor's grandchildren may be born to a child of the settlor who is not yet a life in being. That grandchild may well reach the age of majority more than 21 years after the end of the relevant lives in being. It makes no difference at common law, of course,

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[40] If it is possible to do so, an interest will be construed as vesting on creation or as soon as possible thereafter (see *Re Petrie*, [1862] Ch. 355). Thus, as Megarry and Wade suggest, "A natural inclination to save gifts from the perpetuity rule sometimes leads to fine distinctions" (R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, (3rd ed.), 1966, p. 217). Gray, *supra*, note 1, 603 complains of "doubtful English cases . . . in which rules of construction have been or are supposed to have been, unduly warped in order to prevent remoteness." But it should be noted that it is also a well established rule of construction that, at least in principle, a will or trust should be construed without considering the possibility of perpetuity problem so that the process of interpretation will not be influenced by an inclination to save the gift from the rule (*Dunganon v. Smith*, 12 Cl. and F. 546). See also Gray, *supra*, note 1, pgs. 599-600 and the cases referred to therein.

[41] *Blagrove v. Hancock* (1848), 16 Sim. 371.

[42] *Re Villar*, [1929] 1 Ch. 243 (descendants of Queen Victoria). There is some danger in specifying a large class of lives in being, since the class may be regarded as too uncertain for purposes of establishing the perpetuity period — see *Re Morre*, [1901] 1 Ch. 936, where the estate was to be distributed "21 years from the death of the last survivor of all persons who shall be living at my death".

[43] R.S.S. 1978, c. W-14.

whether or not the birth of a further child to the settlor after the trust comes into effect is a remote possibility due to the age or infirmity of the settlor. The possibility, no matter now unlikely, is enough to trigger the rule.[44]

Since few testators today are interested in providing for descendants further removed than the second generation, most contingent interests created by will avoid perpetuities problems. It is, however, still very easy to create a perpetuitites problem by adding other conditions which postpone vesting. If, for example, vesting is postponed to an age greater than 21 years, the rule may be infringed.[45] A perpetuities problem may also arise if lives other than those of a testator's descendants are relevant in determining the time of vesting. For example, a grant of a life estate to an unmarried man, remainder to his widow for life in the event that he marries, and then to their surviving children, infringes the rule.[46] Even a gift which does not appear to span more than a single generation may be invalid if it is made conditional upon the happening of a future event. Thus a gift to the daughters of A who marry will be invalid if A is alive at the time of the gift since he may have a daughter who does not marry until more than 21 years after his death.[47]

At common law, a class gift will fail if the interest of any member of the class might vest outside the perpetuity period.[48] However, the rule in *Andrews* v. *Partington* may operate to save a gift for part of the class. Under that rule, in the absence of any clear indication to the contrary, a testator is presumed to have intended that the class should close as soon as the first share vests in possession.[49] Thus, if a bequest is made to grandchildren upon reaching the age of 21, the class closes when the first grandchild reaches the age of 21. It will then include only those children alive at the time the first interests vests. Therefore, if the interest of any member of a class is vested at the time a trust takes effect, all members of the class who will be entitled to take anything under the trust will be lives in being, and perpetuities problems will be avoided. The courts may lean toward application of the rule in *Andrews* v. *Partington* in order to save a bequest, but if the court is forced to construe the bequest as one intended to benefit all members of the class, whenever born, the court may be forced to apply the rule against perpetuities to defeat the testator's intention.[50]

Blackstone called the English law of real property "a fine artificial system, full of unseen connections and nice dependencies".[51] If those cases where the courts were willing to bend the rule to save a bequest are set aside, the rule against perpetuities stands as a paradigm example of Blackstone's proposition. The rule

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[44] *Jee* v. *Audley*, *supra*, note 18.

[45] See *Leake* v. *Robinson* (1817), 2 Mer. 363, where a bequest to A for life, then to her children who obtain the age of 25 was held to infringe the rule. Under the rule in *Saunders* v. *Vautier*, a beneficiary who is entitled to the entire beneficial interest in property may demand transfer of the property upon obtaining the age of majority, even though the will or trust provides otherwise. The rule in *Saunders* v. *Vautier* may, then, save some bequests which appear to infringe the rule against perpetuities (*Farmer* v. *Francis*, 2 Bin. G. 151.) Ironically, the bequest will be saved in such a case because the settlor failed to use an appropriate formula to protect the bequest against the operation of the rule in *Saunders* v. *Vautier*.

[46] See *Hodson* v. *Ball* (1845), 14 Sim. 558. Since the bachelor might conceivably marry a woman not yet born at the date the will took effect, the bachelor is the only relevant life in being. If his wife lives long enough, his children may not take a vested interest until more than 21 years have elapsed after his death.

[47] The example is provided by Richard Gosse, *Ontario's Perpetuities Legislation*, (1967), p. 3.

[48] *Re Lord's Settlement*, [1947] 2 All E.R. 685.

[49] (1791), 3 Bro. C.C. 401. See also R.E. Megarry and H.W.R. Wade, *The Law of Real Property*, (3rd ed.) 1966, p. 237.

[50] Phrases such as "all and any", "whenever born", or "born or to be born" have been held to be not sufficient to oust the rule (See *Dias* v. *de Livera* (1879), 5 App. Cas. 123.) In some cases, the rule appears to have been extended rather further than the bulk of authorities would support – e.g. *Re Powell*, [1898] 1 Ch. 277, in which a gift to the grandchildren of a living person was held valid. The decision is criticized by Gray, *supra*, pgs. 634-642 and by Morris and Leach, *supra*, note 4, pgs. 113, 250.

[51] Hargrave, *Tracts Relative to the Law of England*, (1787), p. 489.

against perpetuities is logical, and upon its own assumptions, consistent in its results — even if it is not as simple and clear as Professor Gray would have us believe. Nevertheless, it is difficult to maintain that the rule effectively implements the social policy which lies behind it. In the *Duke of Norfolk's Case*, Lord Nottingham avoided laying down the rigid rule. He was prepared to state only that he would recognize any future interest as valid so long as no "visible inconvenience doth appear".[52] But as Otto Lang has noted:

> . . . [T]he rule has not stopped there. After the principle of visible inconvenience was used to establish the rule against perpetuities, the legalistic process in its worst sense began to operate upon the rule and it was led into capricious corners of the conveyancing and testamentary world.[53]

The examples of the application of the rule outlined above illustrate the extent to which the validity of a will or trust may depend upon nuances in the wording adopted by settlors, and the construction which the courts choose to place upon them. The rule itself is more often a source of inconvenience than the evil it seeks to prevent.

3. The Reformed Rule

Not surprisingly, the courts have sometimes sought to modify the rule against perpetuities in order to save bequests in apparently deserving cases.[54] Interest in statutory reform is, however, a relatively recent phenomenon, gaining widespread support only after publication of Morris and Leach's treatise on the rule in the 1950's. The principal reform recommended by Morris and Leach was a "wait and see" application of the rule. It is that approach, with some modifications and additions, that has been adopted by most jurisdictions which have reformed the rule in the last 25 years.[55]

The Ontario *Perpetuities Act* provides a typical example of the "wait and see" approach:

> 3. No limitation creating a contingent interest in real or personal property shall be treated as or declared to be invalid as violating the rule against perpetuities by reason only of the fact that there is a possibility of such interest vesting beyond the perpetuity period.
>
> 4(1) Every contingent interest in real or personal property that is capable of vesting within or beyond the perpetuity period shall be presumptively valid until actual events establish.

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[52] *Supra*, note 9.

[53] *Supra*, note 21, p. 297.

[54] E.g. *Edgerly* v. *Barker*, 66 N.H. 434. The court extended the *cy-pres* doctrine to preserve an interest from the rule. Professor Gray, always a defender of the purity of the rule, found the decision to be highly unsatisfactory (9 Harv. Law Rev. 242, and Gray, note 1, *supra*, p. 752.).

[55] Earlier reform legislation usually followed the judicial lead, and adopted a *cy-pres* principle. Such legislation is still in force in California, Missouri and Oklahoma. On early attempts to reform the rule generally, see W. Barton Leach, *Perpetuities Reform by Legislation*, 1954, 70 L.Q.R. 478. A similar approach was also recommended for Saskatchewan by Lang, *supra*, note 21. For the background to more recent legislation, see J.H.C. Morris and H.W.R. Wade, *Perpetuities Reform at Last*, 1964, 80 Law Quarterly Review 486; the Ontario Law Reform Commission, Report Nos. 1 and 1A, *supra*; and Lewis, M. Simes, *Reform of the Law Against Perpetuities in Western Australia*, 1964, 6 University of Western Australia Law Review 21.

> (a) that the interest is incapable of vesting within the perpetuity period, in which case the interest, unless validated by the application of sections 8 and 9, shall be treated as void or declared to be void; or
>
> (b) that the interest is incapable of vesting beyond the perpetuity period, in which case the interest shall be treated as valid or declared to be valid.

Those provisions will save any contingent interest which actually vests within the perpetuity period, rendering void *ab initio* only those interests which cannot possibly vest within the perpetuity period. Since most contingencies are created by conditions that will remain unfulfilled for an indefinite period of time, few interests are void *ab initio* under the Ontario legislation. It is this fact which makes the "wait and see" approach attractive.

On the other hand, it is equally true that almost every interest infringing the common law rule remains potentially invalid under the "wait and see" rule. This fact may produce new problems. As Terence Sheard has pointed out, the reformed rule suspends the final determination of the validity of interests indefinitely. If invalidity ultimately occurs, it may be necessary to re-open an estate which has long since been administered, or, alternatively, to delay administration for years or even decades in order to avoid an ultimate perpetuities problem.[56]

In the final analysis, the reformed rule is unsatisfactory because it does not address the sources of potential invalidity within the rule itself. Why, for example, should a bequest in a will to benefit grandchildren escape the rule, while an *inter vivos* trust for grandchildren might be caught by it? One does not offend the social and economic need to avoid a perpetuity any more than the other. The "wait an see" approach merely takes the hard edge off an unjustifiable aspect of the rule by saving interests which, as luck would have it, vest early. It does not alter the fact that interests differing only in form are treated differently.

Even the advocates of the "wait and see" approach implicitly recognize that a more fundamental critique of the rule is required than their principal reform device suggests. Invariably, the "wait and see" approach is supplemented by other curative provisions. Morris and Leach recommended adoption of a limited *cy-pres* rule[57] to save some grants which do not vest in fact within the perpetuity period. The Ontario *Perpetuities Act*, following this recommendation, provides that:

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[56] Terence Sheard, "Perpetuities — The Proposed New Act" (1966), 14 Chitty's L.J. 3.

[57] Cy-pres — "as near as possible" — is a rule of construction of wills. Although it is now applicable only to preserve a "charitable intent" where the object of a charitable bequest is not in existence (see below, p. 51), it formerly operated to preserve the "general intent" of a testator in some cases where a will contained a gift beyond the limits prescribed by law by construing the gift as an estate tail. Thus, where a testator attempted to grant life estates in succession to his son and grandson, the court converted the bequest to an estate tail male. (*Parfitt* v. *Hember*, (1867), I..R. 4 Eq. 443.

8(1) Where a limitation creates an interest in real or personal property by reference of the attainment by any person or persons of a specified age exceeding 21 years, and actual events existing at the time the interest was created or any subsequent time establish,

(a) that the interest, apart from this section, will be void as incapable of vesting within the perpetuity period; but,

(b) that it would not be void if the specified age had been 21 years, the limitation shall read as if, instead of referring to the age specified, it had referred to the age nearest to the age specified that would, if specified instead, had prevented the interest from being so void.

Since attainment of the age of majority is a common condition in wills and trusts, the age reduction rule will be effective to save contingent interests in many cases. It is further supplemented in the Ontario Act by a provision to save "surviving spouse" conditions in some cases by treating the future wife of a bachelor as a life in being[58], and by a presumption in regard to capacity to have children.[59]

Some jurisdictions that have adopted the "wait and see" approach prefer to supplement it with an even broader version of the *cy-pres* doctrine. The British Columbia Act, for example, admits medical evidence of infertility, applies a "wait and see" approach, and provides for age reduction to save bequests. If none of those approaches will save the bequest, however, the court may apply a general *cy-pres* jurisdiction to bring the trust into conformity with the rule.[60]

General *cy-pres* has been criticized as a "vague and uncertain jurisdiction."[61] Even the more limited form of *cy-pres* entailed in the Ontario age reduction rule and similar curative provisions are also open to that criticism. Commenting on the age reduction rule created by the New Hampshire Courts, Professor Gray argued that age reduction might effectively destroy a testator's intention in the guise of preserving it. The testator may have specified a vesting age greater than 21 years in order to protect the property from a potentially profligate heir. The care taken by the testator and his advisors to avoid application of the rule in *Saunders* v. *Vautier* in order to achieve that purpose may be nullified by application of the age reduction rule.[62]

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[58] *Ibid.*, s. 9.

[59] *Ibid.*, s. 7. It is presumed that a female is unable to have a child at less than the age of 12, or more than the age of 55. Males are presumed to be fertile only after the age of 14. In addition, evidence may be adduced to show that a particular living person is unable to parent a child. The Ontario legislation also contains certain other ameliorative provisions. Section 6(1) preserves the common law rule for determining "lives in being", except that a person who was alive but not ascertainable when an instrument was created is excluded (for discussion, see Gosse, *supra*, note 47, 20-32). Section 8(2) and (3) provides that a limitation to a class may be partly valid and party invalid, reversing the common law rule. Although section 6(2) preserves the rule in *Andrews* v. *Partington*, the utility of the rule is greatly reduced by the change in treatment of class gifts.

[60] The *Perpetuities Act* (B.C.), *supra*, note 5.

[61] The United Kingdom Law Reform Committee, 4th report, 1956, Cmd. 18.

[62] Gray, *supra*, note 1, 757 ff. Gray noted that age reduction may ultimately cause the property to fall into the hands of different persons than those who would receive it if the bequest were valid and no age reduction applied. This argument appealed to Gray because it was a basic principle of the *cy-pres* doctrine as applied to estates tail that "the indispensible condition for the application of the doctrine of *cy-pres* is that the persons who take under it shall be the same, no more and no fewer, than those whom the testator intended to give the estate" *ibid.*, 760.

Any reform or abrogation of the rule against perpetuities which recognizes a continuing need to prevent property from being rendered virtually inalienable for long periods of time must substitute a discretion for the rigid rule. The reformed rule relies upon discretion to place worthy cases outside the rule, but retains it in modified form. When the rule is infringed, the court will be required to depart from the intention of a testator or settlor. If the rule is abolished, the testator or settlor's intentions must also give way in some cases to a policy against perpetuities. But it is important to recognize that the nature and impact of the discretion is different under these two regimes. To the extent that the reformed rule imperfectly embodies the policy against inalienability, intentions will be thwarted even where there is no real affront to that policy simply in order to place a will or trust outside the rule. The *inter vivos* trust for grandchildren must still be modified, while the will to benefit the same persons will be left alone. If on the other hand the rule is abolished, the court's discretion will be exercised only to modify a trust that is unreasonable on its face, or has become unreasonable through changed circumstances. It will be necessry to depart from a settlor or testator's intention in fewer cases, and in a less radical fashion. Moreover, final decisions will be made as the estate is being administered, rather than waiting to see if a technical perpetuitites problem emerges.

B. The Rule Against Perpetuities and Options to Purchase

1. The Rule at Common Law

Application of the rule against perpetuities to options to purchase land has been considered by the Saskatchewan courts in several cases.[63] Unfortunately, despite the fact that the question has also come before the Supreme Court of Canada on at least three separate occasions,[64] no other aspect of the rule against perpetuities remains as confused and uncertain.

Since the leading case of *London and Southwestern Rail Company* v. *Gomm*, it has been reasonably well settled that an option to purchase may be subject to the rule. In that case, an option was characterized as an interest in land that vests when it is exercised. If the option is capable of being exercised outside the perpetuity period, it infringes the rule. Since it is unlikely that any life in being will be relevant for purposes of determining when the option may be exercised, the applicable perpetuity period will ordinarily be 21 years.[65]

At least three significant issues remain unsatisfactorily resolved despite the relatively clear language in the *Gomm* case. First, certain types of agreement that might be characterized as options in a broad sense may not create interests in land. Halsbury suggests that "a right of pre-emption or right of refusal is subject to the rules [against perpetuities]"[66], but that proposition, unless it is significantly qualified, is doubtful. In *Canadian Long Island Petroleums Limited* v. *Sadim Oil and Gas Company Limited*, the respondent had a pre-emptive right to purchase certain property on the same terms as those offered by any third party. It was held that:

> The respondents were not given any right to take away Sadim's interest without its consent. Their right under the clause was a contractual right . . . the contingency in this clause is resolved solely on the decision of Sadim to sell.[67]

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[63] E.g. *Yates Investment Company* v. *Willowby* (1964), 46 W.W.R. 499 (Sask Q.B.); *Forsythe* v. *Prudential Trust Company*, [1960] S.C.R. 210.

[64] *Frobisher* v. *Canadian Pipelines and Petroleum Limited*, [1960] S.C.R. 126; *Forsythe* v. *Prudential Trust Company*, *supra*, note 26; *Harris* v. *Minister of National Revenues*, *supra*, note 39.

[65] [1881-5] All E.R. Rep. 1192; 20 Ch. D. 562 (C.A.).

[66] 22 Halsbury (1st) 321.

[67] [1975] 2 S.C.R. 715 (Per Martland, J.). See also *Kopec* v. *Pyret and Borys* (1983), 25 S.R. 282 (Q.B.) in which it was held that a right of first refusal does not create an interest in land such as can be protected by caveat.

There may be, however, some question as to whether the rule is inapplicable to the rights of first refusal. In *Yates Investment Company* v. *Willowby*, a case that came before the Saskatchewan Court of Queen's Bench before the decision in *Canadian Long Island Petroleums*, a "first opportunity" to purchase property at a stipulated price was held to infringe the rule.[68]

Second, it is not always clear, as a matter of construction, whether or not a particular option is exercisable outside the perpetuity period. In *Re Pongracic*, it was held that an option that was to remain open for acceptance "for 30 days after the purchaser can obtain, with co-operation of the vendor . . . a subdivision agreement . . ." infringed the rule. Presumably, the option in that case remained open indefinitely since no time was fixed for the application for a subdivision agreement.[69] However, some options that include no express time limit have been held to be open only for "a reasonable time".[70] Similarly, in the not infrequent case of an option contained in a lease, it has been held that the option expires with the lease.[71] But even that proposition requires some qualification. In *Tomrey* v. *R.*, the Canadian Exchequer Court held that an option contained in a lease remains open as long as the landlord-tenant relationship subsists, so that where the lease expires but is continued as a tenancy from year to year, the option remains open.[72]

The most difficult problem relating to the application of the rule to options results from the fact that most options are created by contract. The rule against perpetuities is not applicable to contracts as such. The question then arises as to whether an option created by contract is void for all purposes if it is capable of being exercised outside the perpetuity period, or merely unenforceable as an interest in land by a party out of privity to the original agreement. Halsbury provides a deceptively straightforward approach to the problem:

> A contract relating to a right of or equitable interest in property *in futuro* may be intended to create a limitation of land only, in which case, if the limitation is to take effect beyond the perpetuity period, the contract is fully void and unenforceable; or the contract may, upon its true construction, be a personal contract only, in which case the rule does not apply to it; or it may, upon its true construction, be, as regards to the original covenantor, both a personal contract and a contract attempting to create a remote limitation, in which case the limitation will be bad for perpetuity, but the personal contract will be enforceable if the case otherwise admits, against the promisor by specific performance or by damages, or against his personal representatives in damages only.[73]

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[68] *Supra*, note 63. The decision does not directly address the question of whether the clause granted an interest in property, but *quaere* whether stipulation of the selling price made the agreement more like an option *stricto sensu* than a right of first refusal.

[69] (1962), 35 D.L.R. (2nd) 478 (Ont. H.C.).

[70] See *Bennett* v. *Stodgell* (1916), 28 D.L.R. 639 (Ont. H.C.). It was noted in that case that the court in *Gomm* was precluded from implying that the option remained open for a reasonable time by the words of the agreement itself, which stipulated that the optionee was to have the property at any time in the future when it was needed for railway construction. It might be argued that implication of a reasonable time frame was also precluded by the express language used by the parties in *Re Pongracic*, but it is submitted that the case is less clear.

[71] *Ibid.*

[72] [1930] Ex. C.R. 178. Logically, it would seem that since it is always possible that a lease will be converted to a tenancy from year to year, any option contained in a lease is capable of being exercised outside the perpetuity period. The Exchequer Court appears to have confined its decision to cases where a tenancy from year to year has in fact come into existence after expiration of a lease. This amounts to a "wait and see" application of the rule.

[73] 22 Halsbury (1st) 320.

That passage has been cited by the Supreme Court of Canada with approval in at least two cases.[74] In *Harris* v. *Minister of National Revenue*, however, the passage was again considered by the Supreme Court, but with considerable reservation.[75] In fact, it would appear that two independent lines of authority developed in the wake of the decision in *London and Southwestern Rail Company* v. *Gomm*.

In Southeastern Rail Company v. *Associated Portland Cement Manufacturers*, the option was capable of being exercised outside the perpetuity period, but the action was brought by the optionee himself. Cozens-Hardy, M.R. was unequivocal in his opinion:

> I have listened with some amazement to the contention that the rule of perpetuities applies when the action is brought, not against an assign of the convenantor, but against the convenantor himself, and I have listened with still more amazement when I heard the case of *London and Southwestern Rail Company* v. *Gomm* cited as authority for that purpose.

Farewell, L.J. was of the opinion that an option could be both a personal contract and create an interest in land:

> But the fact that there is some connection with or reference to land does not make a personal contract by A less a personal contract binding on him, with all the remedies arising thereout, unless the court can by construction turn it from a personal contract into a limitation of land, and a limitation of land only.[76]

Similar logic has been applied in a long line of authorities in both England and Canada.[77]

A quite different approach to the relationship between contractual and proprietary rights is evidenced in *Tomrey* v. *R.* In that case, the option was contained in a lease. The option was granted in 1845, and in 1927, Tomrey sought to exercise the option as the original lessee's successor. The court held that the option created in the lease was exercisable outside the perpetuity period, and therefore void. It did not consider the fact that Tomrey, who succeeded to the rights under the lease, was in privity with the lessor.[78] Similarly, in *Auld* v. *Scales*, the Supreme Court, although holding that the option in question did not infringe the rule, appears to have proceeded upon the assumption that it would have been void and unenforceable even in an action between the original parties if it had been found to be exercisable outside the perpetuity period.[79]

In *Harris* v. *M.N.R.*, the most recent Supreme Court decision on the issue, the approach adopted in the *Portland Cement* case was subjected to criticism. Unfortunately, however, the court failed to produce an unequivocal statement of the law. In the *Harris* case, a service station leased to an oil company was concurrently leased to Harris for a term of 200 years with an option to purchase the property at a stipulated price on expiration of the lease. The option was apparently included in the agreement for tax purposes. The court held that the option infringed the rule against perpetuities, and further that it was

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[74] *Frobisher* v. *Canadian Pipelines and Petroleums Ltd.*, *supra*, note 64; and *Forsythe* v. *Prudential Trust Company*, *supra*, note 26.

[75] *Supra*, note 39.

[76] [1910] 1 Ch. 12.

[77] *Hutton* v. *Watling*, [1947] 2 All E.R. 641; *Kennedy* v. *Beauchge Mines Limited* (1959), 20 D.L.R. (2nd) 1 (Ont. H.C.); *Re Pongracic*, *supra*, note 69; *New Federal Oils Limited* v. *Rowland*, [1929] 1 W.W.R. 263 (Alta. C.A.); *Prudential Trust Company* v. *Forsythe*, *supra*, note 26.

[78] *Supra*, note 72.

[79] [1947] S.C.R. 543. Cartwright, J. in *Harris* v. *M.N.R.*, *supra*, note 39, characterizes the opinions delivered in the *Auld* case in this manner.

unenforceable by Harris as either a proprietary right or as a contractual right. Cartwright, J. found that "as a matter of construction the clause granting the option . . . is one agreeing to create a contingent future interest . . . and nothing else." He also cast a doubt, however, on the proposition that an option agreement can ever be regarded as both a personal contract and as creating an interest in land. He found "difficulty" in

> suggesting that a single contract could be at once "merely personal" and one creating an interest in land . . .. If the agreement to create the contingent future interest is taken out of the clause, there is no agreement left to be described as a personal contract.[80]

If the latter proposition is accepted without qualification, it would suggest that few, if any, options are enforceable as contracts.

2. The Reformed Rule

An option to purchase is most apt to infringe the rule against perpetuities by failing to provide, directly or by implication, any limit on the period within which the option is to be exercised. For that reason, application of a "wait and see" approach to options will save many of them from the rule. Section 13(3) of the Ontario *Perpetuities Act* expressly applies the "wait and see" approach to options, and fixes a 21 year perpetuities period.[81]

The Ontario Act also attempts to address some of the difficulties in applying the rule to options outlined above. An option contained in a lease will not infringe the reformed rule if it expires within one year following the termination of the lease.[82] Perhaps more significantly, the relationship between contractual rights and proprietary rights is resolved by the Ontario legislation. If an option offends the rule, it is void

> as between the person by whom it was made and the party to whom or in whose favour it was made and all persons claiming through either or both of them, and no remedy lies for giving effect to it or making restitution for its lack of effect.[83]

The Ontario legislation provides some much needed clarification in an uncertain area of the law. It does not, however, come to grips with the basic question: does a perpetual option present a practical or commercial difficulty that requires application of the rule against perpetuities?

At least before the decision of the Supreme Court of Canada in *Harris* v. *M.N.R.*, an option granted to a corporation was virtually perpetual, since it could likely be enforced by an action in contract after expiration of the perpetuity period. It may be that Ontario chose to assimilate contractual to property rights for purposes of the rule in order to prevent survival of contractual rights for excessively long periods of time in just such cases. However, the rule against perpetuities does not apply to other contractual rights. More to the point, during the 80 years between the *Gomm* case and *Harris* v. *M.N.R.*, the rule of construction that permitted contractual rights to survive the end of the perpetuity period was not a problem, except to the extent that it spawned perpetuities litigation.

It can be argued, of course, that an option is more objectionable in perpetuity as an interest in land than as a mere personal right in contract. But there are many examples of proprietary interests which can be a clog on title for indefinite periods of time. A lien, an interest created by a constructive or resulting

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[80] *Supra*, note 39.

[81] *Supra*, note 5.

[82] *Ibid.*, s. 13(1). Section 13(4) expressly provides that the rule does not apply to options to renew a lease, but the law on that point appears to be settled in any event.

[83] *Ibid.*, section 13(3).

trust, or even a writ of execution that is periodically renewed is no more or less objectionable than an option to purchase that remains open indefinitely. Options are caught by the rule against perpetuities only because, technically, they are interests which do not vest until they are exercised. Other equally "perpetual clogs" avoid the rule because they vest upon creation.

No unacceptable commercial inconvenience need result from interests capable of clouding title for long periods of time. A writ of execution registered against land, for example, does not in practice prevent alienation of land; rather, it requires the landowner to accommodate the judgment creditor before selling or encumbering the land. Such arrangements are commonplace in the practice of real estate lawyers.

In sum, the rule against perpetuities is too uncertain and variable in its application to options to purchase to make it an effective instrument for pursuit of any realistic policy goals, and the evidence that any policy against perpetuities in regard to options is necessary or desirable is weak.

C. The Rule Against Perpetuities and Powers

1. Administrative Powers

A power of sale or other administrative power conferred on a trustee that is capable of being exercised outside the perpetuity period is, on its face, invalid. A power to sell gravel pits when they were worked out has been held to infringe the rule,[84] as has a power of sale exerciseable during the lifetime of an unborn person.[85] If, however, the power must, by implication, be exercised within the perpetuity period, no separate time limit for its exercise need be specified.[86]

Since an administrative power creates no interest in property, application of the rule against perpetuities to powers is suspect in principle. It is likely that the rule was extended to administrative powers to prevent their use as a mechanism for the *de facto* distribution of property. For example, a will might provide for transfer of property to a named individual for nominal consideration. If such powers were valid, they could be used to circumvent the rule.

Section 12 of the Ontario *Perpetuities Act* provides:

> The rule against perpetuitites does not invalidate a power conferred on trustees or other persons to sell, lease, exchange or otherwise dispose of any property, or to do any other act in the administration (as opposed to the distribution) of any property including, where authorized, payment to trustees or other persons of reasonable remuneration for their services.[87]

The explicit antithesis between administration and distribution contained in the Ontario Act is an invitation to the court to address the problem of whether a particular power should be construed as administrative or distributive in intent. In the result, it may be difficult to predict whether a particular power will escape the rule under the legislation. Reform of the rule as it applies to administrative powers may have created as many problems as it has solved.

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[84] *Re Wood*, [1894] 3 Ch. 381.

[85] *Goddier* v. *Johnson* (1881), 18 Ch. D. 441.

[86] *Peters* v. *Lewes and East Grinstead Ry.* (1881), 18 Ch. D. 429.

[87] *Supra*, note 5, s. 12(1). This provision is one of the few in the Ontario Act that was made retroactive (see section 12(2)). The English Act contains language similar to that of section 12(1) of the Ontario Act, but also requires that the disposition be made "for full consideration" if it is to escape application of the rule. See Morris and Leach, *supra*, note 4, supplement (1964), p. 15 and Gosse, *supra*, note 47, p. 51.

2. Powers of Appointment

The rule against perpetuities applies differently to special and general powers of appointment. A special power, under which appointment is restricted to a specified class of potential appointees, places a significant restriction on disposal of property.[88] Such a power is very like a discretionary trust in its effect, and is treated in a similar fashion for purposes of the rule. If the special power is capable of being exercised outside the perpetuity period, it is invalid.[89] A general power, on the other hand, may be exercised in favour of any person, including the donee of the power. It is thus barely distinguishable from an absolute grant to the donee.[90] A general power infringes the rule only if the power cannot be exercised by the donee until after expiration of the perpetuity period.[91]

The case for application of the rule against perpetuities to powers of appointment is certainly no stronger than the case for application of the rule to trusts. The Ontario *Perpetuities Act* applies a "wait and see" approach to both special and general powers;[92] that approach is subject to the same limitations as those attaching to "wait and see" in a trust context. The inherent difficulty in classifying powers of appointment as general or special renders application of the rule to powers of appointment even more problematic.[93] That an uncertain distinction might determine whether the rule applies in full force is evidence of the failure of the rule to effectively implement the policies it was designed to serve. The Ontario Act attempts to provide some guidance in classifying powers of appointment.[94] But no classification of powers will avoid a certain arbitrariness in the application of the rule. There is no sound reason, for example, why a power that may be exercised in favour of any person more than 21 years after its creation is valid, while a similar power that requires the consent of some person other than the donee of the power before it is exercised is invalid. Yet that result follows from both the common law and the Ontario *Perpetuities Act*.[95]

D. Charitable Trusts

The rule against perpetuities does not apply with full force to charitable trusts. A charitable trust may be of indefinite duration without infringing the rule. However, if the charity is to take a benefit only upon the occurrence of some contingency in the future, the rule may apply. Thus, for example, a bequest providing for payment of income to a charity in perpetuity does not infringe the rule, but if the income is payable only after the expiration of an antecedent life interest in the income, a perpetuities problem may exist.[96] The rule may also defeat a charitable trust if the charitable object is not in existence when the trust takes effect, but the general intent to benefit charitable objects may be preserved by application of the

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[88] Megarry and Wade, *supra*, note 40, p. 258.

[89] *Re DeSommery*, [1912] 2 Ch. 622.

[90] Megarry and Wade, *supra*, note 40, p. 261.

[91] *Re Fane*, [1913] 1 Ch. 404.

[92] *Supra*, note 40, s. 4(2) and (3).

[93] Gosse, *supra*, note 47, 50 notes the difficulty and poses as an example a power to appoint to any person other than the donee. See generally, Megarry and Wade, *supra*, note 40, 258.

[94] *Supra*, note 40. In substance, the power of appointment is general if it is capable to being exercised by one person only and can be exercised in favour of the donee himself "without the consent of any other person or compliance with any other condition." Subsection 3 provides that a power exercisable only by will is not to be construed as a special power for that reason alone, thus resolving a matter that is the subject of conflicting authorities at common law.

[95] See *Re Watts*, [1931] 2 Ch. 302 and *ibid.*, s. 11(1)(b).

[96] See *Re Doyle* (1914), 5 O.W.N. 911 where both aspects of the matter were considered. Generally, see Donovan Waters, *The Law of Trusts in Canada* (2nd ed.), 1984, 516-531.

cy-pres doctrine in many cases. Unless it appears that the settlor had no general charitable intent, or there is a gift over in the event of failure of the charitable object, the court may apply the trust fund to charitable purposes similar to those envisioned by the testator.[97]

It is difficult to determine why the common law preserved any role for the rule against perpetuities in regard to charitable trusts. *Cy-pres* will operate to ameliorate application of the rule when a charity is not in existence. If an existing charity is to receive a benefit only on the happening of some remote contingent event, there appears to be no good reason why the court should not be left to apply the *cy-pres* doctrine if the designated charity is no longer in existence when the contingency occurs. The rule against perpetuities, however prevents application of the *cy-pres* doctrine in that manner.

E. Employee Benefit Plans

"Charitable purposes" has a restricted, through by no means settled, meaning in trust law. The status of pension plans and other employee benefit trusts has been uncertain until relatively recently. In 1955, the Judicial Committee of the Privy Council, on appeal from the Supreme Court of Canada, held in *Re Cox* that even a non-contributory employee benefit trust established for relief of poverty among former employees did not benefit a large enough section of the public to qualify as charitable.[98] More recently the courts have re-examined the issue. In *Jones* v. *T. Eaton Co.*, the Supreme Court held that a trust for employees can be regarded as charitable if its purpose is relief of poverty.[99] Contributory pension plans, however, may still not qualify as charities since they can be characterized as retirement savings plans established in the self-interest of the contributors.[100]

If an employee benefit plan is not charitable, the rule against perpetuitites will apply to it in full vigour in the absence of remedial legislation. Since pension plans may confer benefits on future employees at indefinitely remote times, application of the rule to them would be an obvious source of difficulty. In 1957, the Saskatchewan *Queen's Bench Act* was amended, perhaps in response to the decision in *Re Cox*, to exempt all employee benefit plans from the rule against perpetuities and *The Accumulations Act:*

> The rules of law and statutory enactments relating to perpetuities and to accumulations do not apply and shall be deemed never to have applied to the trusts of a plan, trust or fund established for the purpose of providing pensions, retirement allowances, annuities, or sickness, death or other benefits to employees or to their widows, dependants or other beneficiaries.[101]

Similar legislation has been adopted in other jurisdictions.[102]

If the rule against perpetuities is abolished and *The Accumulations Act* repealed, no special rule relating to employee benefit plans will be required.

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[97] See Sheridan, "The Cy-pres Doctrine" (1954), 32 Can. Bar Rev. 599.

[98] [1955] 2 All E.R. 550, affirming [1953] 1 S.C.R. 94.

[99] [1973] S.C.R. 635; see also *Dingle* v. *Turner* [1972] 1 All E.R. 373 (H.L.).

[100] Waters, *Law of Trusts in Canada*, *supra*, note 96, p. 560.

[101] S.S. 1957, c. 27, s. 1(4). See now R.S.S. 1978, c. Q-1, s. 45, rule 22.

[102] E.g. *The Perpetuities Act* (Ontario), *supra*, note 5, s. 18.

F. Other Applications of the Rule

In principle, the rule against perpetuities should not apply to profits a prendre, easements and restrictive covenants. Such interests, through indefinite in duration, vest immediately upon creation. As Gray wrote, "easements, profits a prendre and other rights over the land of others are not future but present interests, and the rule against perpetuities has no application to them."[183] However, that proposition may need some qualification.

In *Dunn* v. *Blackdown Properties Limited*, the rule was held to apply to a grant of an easement "to use the sewers and drains then passing or thereafter to pass under the roads [subject to the grant]." At the time the easement was granted, there were no sewers and drains beneath the roads. The court was of the opinion that:

> There is no doubt that the rule against perpetuities applies to grants of easements. It follows that, where the grant is not immediate but is of an easement to arise in the future, it will be void unless it is limited to take effect only within the perpetuity period.[184]

The difficulty created by extension of the rule to future easements was recognized by the court itself. Cross J. noted that "it is not, however, always easy to decide whether the grant in question is of an immediate right or a right to arise in the future."[185]

In Ontario, application of the rule to future easements, profits a prendre and similar interests has been confirmed by the *Perpetuities Act*, which establishes a uniform 40 year perpetuity period for that purpose.[186] The legislation provides no guidance, however, to aid the court in determining whether an easement is to be construed as vested or contingent.

The decision in *Dunn* v. *Blackdown Properties* is a good example of the reason why the English Law Reform Committee described the rule against perpetuities (in a somewhat different context) as an "unruly dog wandering into the wrong places".[187] The rule against perpetuities was devised as a rule relating to remoteness of vesting. The concept of vesting really has no place in the law relating to easements. The rule can do considerable mischief when applied to those interests contemplated by the judges who originally created the rule; it is apt to spawn even more unsatisfactory decisions when it is extended by analogy to other interests.

Estates subject to conditions subsequent or conditional limitations may revert back to the grantor if a condition is breached, and therefore create a continuing interest in the grantor. But these rather peculiarly distingished interests are affected by the rule against perpetuities in quite different ways. When property is granted subject to a condition subsequent, the grantor retains a "right of re-entry" exercisable upon breach of the condition. The property reverts to the grantor only if the re-entry is actually made. An estate subject to a conditional limitation (also called a determinable interest) is similar in effect: if a grant contains words of limitation causing the interest to determine upon the happening of a specified event, the grantor retains a "possibility of reverter." However, upon breach of the conditional limitation, the property reverts automatically, without any entry being made.[188] The use of terms such as "unless" or "until" to indicate the circumstances in which a reversion will occur are more likely to be construed as

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[183] *Supra*, note 1, p. 309.

[184] [1961] 2 All E.R. 62.

[185] *Ibid.*, at 67.

[186] *Supra*, note 5, s. 14.

[187] *Supra*, note 61, para. 34.

[188] See generally, Anger and Honsberger, *supra*, note 11, pgs. 90-95.

creating a determinable interest than an interest subject to a condition subsequent, but the authorities are by no means clear.[109]

Because property subject to a condition subsequent does not revert until a re-entry is made, it has been held that no interest vests in the grantor until the condition has been breached. If the right of re-entry is capable of being exercised after expiration of the perpetuity period, it follows logically that it infringes the rule. That point of view appears to be reflected in a majority of decisions in which the issue has been raised.[110] Nevertheless, Challis has argued that conditions subsequent antedate the rule against perpetuities, and were not intended to be affected by it. Characterization of the right of re-entry as a circumstance which causes an interest to vest is of doubtful historical or conceptual validity.[111]

Determinable interests have been treated differently. The interest possessed by the grantor of a determinable interest can be regarded as vested, since it arises automatically upon the termination of the estate defined by the conditional limitation. For that reason, it has been held that the rule against perpetuities is of no application to determinable interests.[112]

Interests subject to conditions subsequent are now rare, and determinable interests rarer still.[113] Nevertheless, the uncertain and conflicting treatment of these interests under the rule against perpetuities is another example of the extent to which the technical aspects of the rule have obscured and perhaps even thwarted the purposes the rule was designed to serve.

III. THE RULE IN WHITBY v. MITCHELL

The rule against remoteness of vesting usually called the rule against perpetuities is more correctly referred to as the "modern rule against perpetuities." It is modern in the sense that it cannot be traced any further back in time than the *Duke of Norfolk's Case* in 1682. The English courts grappled with the question of perpetuities before that date. At least as early as *Chudleigh's Case* in 1556, doubts were expressed about the practice of piling contingency upon contingency in order to keep land within a family. In that case, Chief Justice Popham held that:

> If the feoffment be made to the use of A for life, and after to the use of every person who should be his heir, one after another, for the term of life of each such heir only; in this case if this limitation should be good, the inheritance would be in nobody; but this limitation is merely void . . . A perpetual freehold is not agreeable with the rule of law in estates in possession.[114]

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[109] As a matter of construction, the question is whether or not the condition is to be construed as part of the "words of limitation" that define the extent of the estate subject to the grant, or as a condition that may cause the grantee to lose an estate.

[110] *Re The Trustees of Holli[illegible] Hospital and Hague's Contract* [1899] 2 Ch. 440; *Re St. Patrick's Market* (1909), 1 O.W.N. 92.

[111] Challis, *Real Property* (3rd ed.), 187. See also *Jarman on Wills*, 6th edition, 374-6.

[112] *Hopper* v. *Corporation of Liverpool* (1944), 88 S.J. 213; *Att. Gen.* v. *Pyle* (1738), 1 Atk. 435.

[113] The former may be created by will or contract and protected by caveat under the land titles system. Section 243 of *The Land Titles Act*, *supra*, note 10, may abolish determinable interests in Saskatchewan. That section provides that "no estate in fee simple shall be changed into any limited fee or fee tail". A limited fee can be construed to mean a fee simple subject to a conditional limitation.

[114] 1 Co. 120. Despite the fact that contingent remainders were recognized at common law, it would appear that they were not used in practice until family settlements came into vogue under the Tudor dynasty. *Chudleigh's Case* is, in fact, the earliest reported decision involving contingent remainders.

It is not clear just what "rule of law" Chief Justice Popham had in mind. It may be that he contemplated a general rule against "double possibilities", so that any contingency following upon a contingency would be invalid. Such a rule was rejected in the *Duke of Norfolk's Case*[115], and as Megarry and Wade note, "has been rejected by the best of authority" since the time of Coke.[116] Nevertheless, the rule against double possibilities survived in an attenuated form. In 1890, the English courts were able to find authority for the rule which has been known since as the rule in *Whitby* v. *Mitchell*: if an interest in realty is given to an unborn person, any remainder to his issue is void, together with all subsequent limitations.[117] Apparently, the rule applies to both legal and equitable remainders in real property.[118]

The rule would be of no consequence if it were not for the fact that some remainders may infringe it without infringing the modern rule against perpetuities. Consider, for example, a grant of a life estate to a person who has no children at the time of the grant, remainder to his first born son for life, remainder to the first born son of that son to be born within 21 years of A's death. Since the most remote interest vests within 21 years of the death of a living person, the rule against perpetuities is avoided. The rule in *Whitby* v. *Mitchell*, however, will apply.[119]

The rule in *Whitby* v. *Mitchell* is an anachronism. It is simply a survival of an early and unsuccessful attempt to grapple with the perpetuity problem. A broader rule became necessary when more inventive forms of settlement than a succession of life estates for heirs were devised. Nevertheless, the rule survived as an independent doctrine. It has been described as "a purposeless trap for unwary draftsmen",[120] and has been abolished by all jurisdictions that have reformed the rule against perpetuities.[121]

IV. THE RULE AGAINST ACCUMULATIONS

Whether The Accumulations Act was necessary at the end of the 18th century in England to prevent the wealth of the nation from falling into the "black hole" of blind trusts is a matter for historians. Since the Act has been repealed in all the western provinces except Saskatchewan,[122] it would be difficult to argue that the legislation is necessary today, at least in this part of the common law world. But there are also more technical reasons for doubting the continued utility of the Act. Perhaps because the policies it serves no longer appear relevant or intelligible, application of the Act does not produce consistent results.

The Act establishes four accumulations periods:

> (1) the life of a grantor or settlor;
> (2) 21 years from the death of any grantor, settlor, devisor or testator;
> (3) the minority of any person, including a person *en ventre sa mere*, at the death of the grantor or settlor; and
> (4) the minority of any person who would be for the time being, if of full age, entitled to the income accumulated.

The periods are alternative, not cumulative, so that the court is required to identify the correct period to apply in each case.[123] If an accumulation exceeds the relevant statutory period, only that portion of the

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[115] *Supra*, note 9.

[116] *Supra*, note 40, p. 209.

[117] *Whitby* v. *Mitchell* (1890), 44 Ch. D. 85.

[118] Megarry and Wade, *supra*, note 40, 207 ff.

[119] *Ibid.*, 209.

[120] *Ibid.*, 213.

[121] E.g. the Ontario *Perpetuities Act*, *supra*, note 5, s. 17.

[122] See above, note 37.

[123] The third period is applicable where the relevant beneficiary is a life in being at the time the trust takes effect, while the fourth applies where the relevant beneficiary is neither born or *en ventre sa mere*. See *Wilson* v. *Wilson* (1851), 61 E.R. 111.

accumulation which occurs outside the period is void.[124] However, if the accumulation period exceeds both the statutory period and the perpetuity period, it is void *in toto* as an infringement of the rule against perpetuties.[125]

Surprisingly, *The Accumulations Act* applies to charitable trusts. The inconvenience created for charities by that fact has led to rather creative construction of the terms of charitable trusts in order to avoid application of the Act. In the result, the concept of an accumulation itself has been rendered somewhat uncertain. In *Re Fossum*, a will directed that half the income from a fund established to further charitable objects be added to capital each year. Since the trust was for charitable purposes, the rule against perpetuities did not apply, and the court further held that no accumulation was involved, but rather that "it is not a matter of accumulation at all but rather an augmentation of principal by application of income." Any income produced by the enlarged fund that could not be used for the purposes of the trust could, in the court's opinion, be applied to other charitable purposes by application of the *cy-pres* doctrine.[126]

Ontario amended *The Accumulations Act* in 1966 to provide two new accumulation periods,[127] and the Act was made inapplicable to employee benefit trusts such as pension plans.[128] The amendments, however, do little to make the Act more intelligible, much less to make the policy underlying it relevant. Repeal of the legislation is clearly preferable to amendment.

V. PROPOSALS

1. The Rule Against Perpetuities and Variation of Trusts

The common law rule against perpetuities is an ineffective mechanism to achieve the very purposes for which it was designed. Nevertheless, the basic policy which underlies the rule against perpetuities should not be rejected simply because the vehicle for carrying out that policy is flawed. As Lord Nottingham long ago suggested, any trust or other succession of interests that continues in force long enough to produce "inconvenience" should be brought to an end. The nature of such inconvenience should be specified as clearly as possible before framing proposals for reform or abolition of the rule.

A trust or other arrangement which effectively ties up property so that it is rendered inalienable or virtually inalienable for long periods of time will almost inevitably be a source of difficulty for the beneficiaries the trust was designed to serve. If property is held in trust in such a manner that the beneficiaries cannot gain access to the capital, it may be difficult for them to use the property to its full potential. Property used to carry on a business, for example, may be required as security to raise capital for business purposes; a sale of the property, through not permitted by the trust, may make good commercial sense. In some cases, the trust may require that property be retained in an undesirable form, threatening the ultimate interests of both those who have the present benefit and their successors. More generally, a trust arrangement that appeared to carry out the settlor's intention at the time it was established may, as circumstances change, no longer serve that intention.

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[124] *Griffith* v. *Vere* (1803), 32 E.R. 558.

[125] *Marshall* v. *Holloway* (1920), 36 E.R. 681.

[126] *Supra*, note 35. Waters, *supra*, note 96, p. 529, flatly states that "what [the court] was permitting . . . was a contravention of *The Accumulations Act*, 1800." Waters suggests tha the trial judge should have ruled that the accumulation could continue for only 21 years, and that thereafter the income directed to be accumulated by the will should have been applied *cy-pres*.

[127] See now *The Accumulations Act*, R.S.O. 1980, s. 1(1), clauses 5 and 6. The new periods are (1) the duration of the minority of any person living or *en ventre sa mere* at the death of the settlor, and (2) the duration of the minority of any persons who would be, if a full age, entitled to income directed to be accumulated.

[128] *Ibid.*, s. 3. Compare *The Queen's Bench Act*, *supra*, note 101, Rule 22, s. 45.

The rule against perpetuities was designed primarily for the benefit of beneficiaries. It recognizes the fallibility of human judgment; no settlor can so perfectly foresee future conditions as to justify perpetual operation of the trust. It is because rigidity in trust arrangements may adversely affect beneficiaries that the community also has an interest in prohibiting perpetuities. If a business fails or land cannot be sold because of a perpetual trust, the economic and social interests of the community as a whole are indirectly affected.

It is perhaps surprising that the relevance of variation of trusts legislation to the perpetuities problem was not widely recognized until the publication of the Manitoba Law Reform Commission's *Report on the Rules on Accumulations and Perpetuities* in 1982.[129] It may be that the history of the legislation provides a partial explanation. The English *Variation of Trusts Act* was adopted in 1958 as a response to the decision of the House of Lords in *Chapman* v. *Chapman*. That case held that the courts have no inherent jurisdiction to vary the terms of a trust, even when all the beneficiaries under the trust would benefit from the variation.[130] Prior to that decision, lower courts in Britain had found a jurisdiction to vary trusts when changed circumstances, such as amendment of tax law, made it desirable to reorganize trust arrangments.[131]

Variation of trusts legislation is essentially an extension of the rule in *Saunders* v. *Vautier* to permit the court to consent on behalf of incapacitated beneficiaries. The rule in *Saunders* v. *Vautier* permits beneficiaries to demand termination or variation of a trust if the beneficiaries are all fully capacitated, and in agreement. If there are infants or unborn beneficiaries, the rule does not apply. The *Variation of Trusts Act* conferred a broad discretion to approve the "varying or revoking" of trusts and the "enlarging of the powers of trustees" on behalf of an infant or incapacitated beneficiary,[132] beneficiaries who have only contingent interests, [133] unborn beneficiaries,[134] and beneficiaries who may receive an interest only at the discretion of the trustee or some other person upon "failure or determination of any existing interest".[135] The court's discretion is limited only by the requirement that any arrangement approved on behalf of such beneficiaries must be one that "appears to be for the benefit" of the beneficiaries for whom approval is given.[136]

Since 1958, a considerable body of authority has accumulated under variation of trusts legislation. It cannot be said that the authorities are entirely consistent, but the manner in which the legislation would be applied as a substitute for the rule against perpetuities is reasonably clear. Two aspects of the case law are of particular significance in this context. First the intention of the settlor is a guide to the exercise of judicial discretion. In *Re Ball's Settlement*, Megarry J. held that:

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[129] *Supra*, note 6, p. 45. The report notes that it is "especially puzzling to the abolitionist that Professor Maudsley, writing in 1975, did not discuss the significance of this Act, because he will knew the impact the Act had had and continues to have. Professor Maudsley, *The Modern Law of Perpetuities*, (London, 1979), advocated retention of the rule because he could see no other way of "limiting the control by the dead hand of property in the hands of the living" (at p. 222).

[130] [1954] 1 All E.R. 798.

[131] For a brief discussion of the backgrounds to variation of trusts legislation, see Oosterhoff, ed., *Cases and Materials on the Law of Trusts*, (2nd ed.) 1983, 707.

[132] *The Variation of Trusts Act*, *supra*, note 30, s. 2(1)(a).

[133] *Ibid.*, s. 2(1)(b).

[134] *Ibid.*, s. 2(1)(c).

[135] *Ibid.*, s. 2(1)(d).

[136] *Ibid.*, s. 2(2).

> If an arrangement changes the whole substratum of the trust, then it may well be that it cannot be regarded merely as varying that trust. But if an arrangement, while leaving the substratum, effectuates the purpose of the original trust by other means, it may still be possible to regard that arrangement as merely varying the original trust, even though the means employed are wholly different and even though the form is completely changed.[137]

Second, it has been held that "benefit" must be given a wide meaning. In particular, less is required to establish that a variation will benefit a beneficiary whose interest is remote and contingent. In *Farrington* v. *Rogers*, the British Columbia Supreme Court held that:

> It appears that the word "benefit" in *The Variation of Trusts Act*, is to be liberally interpreted, especially if the likelihood of an unborn person realizing a financial benefit is remote, and further, that the benefit contemplated by the Act is not confined to a financial benefit.[138]

Similarly, in *Re Druce's Settlements Trusts*, it was suggested that:

> Any arrangements is capable of being regarded as beneficial under *The Variation of Trusts Act*, 1958, if it can, on balancing probabilities, be regarded as a good bargain, and the fact that in improbable circumstances, no benefit, or even some loss is possible, does not necessarily deprive the arrangement of that quality.[139]

Applied to perpetuities problems, variation of trusts legislation would operate in much the same manner as a general *cy-pres* jurisidiction. It would permit the court to examine a trust document as a whole in the light of the settlor's purposes. Provisions that may create practical difficulty for the beneficiaries as a group because they create remote contingencies could be modified. The court would possess considerable flexibility in this exercise, particularly since it would be entitled to provide less protection in the rearrangement for the interests of remote beneficiaries than for the interests of other beneficiaries. At the same time, unlike the *cy-pres* provisions contained in reform legislation, a variation of the trust would not force a rearrangement simply to bring the trust within the rule against perpetuities. A variation would be justified only when it could be demonstrated that the existence of remote interests is a source of real inconvenience for the trust as a whole.

In Manitoba, adoption of *The Perpetuities and Accumulations Act* was accompanied by amendment of section 61 of *The Trustee Act*, which is that province's variation of trusts legislation. The amendments incorporate proposals made by the Manitoba Law Reform Commission in both its *Report on the Rule Against Perpetuities and Accumulations*, and its *Report on the Rule in Saunders v. Vautier*.[140] While a review of *The Variation of Trusts Act* may be desirable, most of the amendments

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[137] [1968] 2 All E.R. 438. Authorities reflecting this point of view are extensively reviewed in *Re Irving* (1977), 66 D.L.R. (3rd) 387 (Ont. H.C.).

[138] (1980), 6 E.T.R. 156.

[139] [1962] 1 All E.R. 563. Some cases have extended the notion of benefit to questionable limits. For example, in *Re Remnant's Settlement Trusts*, [1970] 2 All E.R. 554, certain forfeiture provisions applicable to Roman Catholic beneficiaries were struck down as undesirable because they could lead to serious dissension between two branches of the family. On the other hand, in *Re Steed's Will Trusts*, [1960] 1 All E.R. 487 (C.A.), it was held that where a testator had made provision for a future spouse of a family member, not even such "spectral spouse" should simply be eliminated as a beneficiary for the benefit of other beneficiaries because to do so would fly in the face of the clear intention of the testator.

[140] Report No. 18, January 5, 1975.

adopted in Manitoba are unnecessary for the purpose of abolition of the rule against perpetuities. However, some modification of variation of trusts legislation will be required if the legislation is to adequately fill the gap left by abolition of the rule. The necessary amendments will be discussed below.

2. Powers of Appointment and Administrative Powers Without the Rule

The Variation of Trusts Act expressly provides that the court may vary a trust to enlarge "the powers of trustees of managing or administering any of the property subject to the trusts".[141] Therefore, administrative powers presently subject to the rule against perpetuities will be subject to variation under *The Variation of Trusts Act* if the rule is abolished.

It is not completely clear whether or not powers of appointment may be modified under variation of trusts legislation. Canadian variation of trusts legislation may differ from the English legislation in this respect. Professor Waters is of the opinion that clause (d) of section 2 of the Saskatchewan Act is sufficiently broad to include a power to appoint among a class.[142] Manitoba has adopted a definition of beneficiary for purposes of its variation of trusts provision that expressly permits variation of both general and special powers of appointment. The provision also makes it clear that the legislation applies to charitable trusts and corporate beneficiaries. A similar provision should be incorporated into the Saskatchewan *Variation of Trusts Act*.

3. Other Future Interests Without the Rule

Although future interests in real property are usually created by trust, it remains possible in Saskatchewan to create successive interests in land without the trust mechanism. The Manitoba Law Reform Commission recommended that these anomalous interests be converted, by operation of law, into trust interests. *The Perpetuities and Accumulations Act* provides that "successive legal interests take effect in equity as interests behind a trust".[143] This provision is augmented by provisions designating the adult beneficiaries at the time the interests take effect as trustees, and providing for court designation of trustees where there is no adult beneficiary or the number of persons qualified to act as trustees exceeds four in number.[144] The variation of trusts provision in the Manitoba *Trustees Act* will, therefore, now apply in that province to future interests whether created by trust or otherwise.

The so-called "legal doctrine of estates" that gives effect to future interests not created by trust is largely an historical anachronism. It does not fit well with the general concepts underlying the Land Titles system. It was probably for that reason that the Manitoba Law Reform Commission recommended abolition of the doctrine by converting legal future interests into trust interests. However, because legal future interests are virtually non-existent in practice in Saskatchewan, such interests may be encompassed by variation of trusts legislation in a simpler manner. Provision can be made for the unlikely possibility that a legal future interest will be created by will, contract, or other grant by extending the scope of variation of trusts legislation to permit variation of legal future interests. This result can be achieved by including legal future interests within the definition of "trust" for purposes of the legislation.

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[141] *Supra*, note 30, s. 2(1).

[142] Waters, *supra*, note 95, p. 1072. Clause 2(1)(d) provides that the court may approve a variation on behalf of "any person in respect of any interest of his that may arise by reason of any discretionary power given to anyone in the failure or determination of any existing interest that has not failed or determined." There is no parallel provision in the English Act.

[143] *Supra*, note 7, s. 4(1).

[144] *Ibid.*, s. 4(2)-(4).

4. Options to Purchase Without the Rule

Variation of trusts legislation could also be extended to include the contingent interest of an optionee under an option to purchase. However, introduction of a discretionary element into the law relating to options would be commercially undesirable. It has been suggested above that options exercisable at some remote time in the future do not create unusual or insurmountable difficulties in any event. For that reason, it is unnecessary in the Commission's opinion for the law to incorporate any mechanism to control options.

It should be noted that the Commission's recommendation in this regard may be open to debate and discussion, even if the general proposition that the rule against perpetuities should be abolished is accepted. Some members of the Bar may be of the opinion that essentially perpetual options may be more troublesome in practice than the Commission suggests, especially in cases where the parties to the option have given it perpetual effect without directly addressing the issue.

Application of a 21 year perpetuities period on a wait-and-see basis, as provided by Ontario perpetuities legislation, effectively places a limit on the time during which an option can remain in effect. It avoids, the principal drawback of the common law rule, which renders options that contain no express time limit void *ab initio*.

It would not be feasible in the context of legislation that generally abolishes the rule against perpetuities to retain the rule, even in a modified form, for application to options alone. It would be possible, however, to enact a statutory limit on the time during which an option can remain in effect. Furthermore, the provision could directly address the problem of options which are inadvertently made perpetual by providing that the statutory limit applies only where the parties have not otherwise provided. While this approach has been rejected by the Commission, it is an alternative which should be given careful consideration by those who question the Commission's approach to the problem of perpetual options.

5. Related Rules

Neither the rule in *Whitby* v. *Mitchell* nor the rule against accumulations serve any valid social policy objective in Saskatchewan at the present time. The rule in *Whitby* v. *Mitchell* should be abolished, and *The Accumulations Act* should be repealed as part of the law of Saskatchewan.

6. Retrospectivity

The Ontario *Perpetuities Act*, like similar legislation reforming the rule against perpetuities in other jurisdictions, is not retrospective or retroactive in effect. The reformed rule applies only to instruments taking effect on or after the day on which the Act came into force. It has no application, for example, to an estate if the testator died before the day the Act came into force. Otherwise, however, a will drafted before that date will be subject to the reformed rule.[145] Presumably, the policy underlying the Ontario Act is based on the notion that it would be inequitable to apply the reformed rule to trust documents that may have been created on the assumption that the common law rule is in effect. As a practical matter, such an approach is inappropriate. Very few Canadian trust documents are created with much regard to the rule against perpetuities, and in any event the effect of applying the reformed rule rather than the common law rule would be beneficial in the vast majority of cases. There seems to be little point in retaining the old rule for some purposes, and the new rule for others.

The Manitoba *Perpetuities and Accumulations Act*, on the other hand, is given broad retrospective effect. A saving provision, however, confirms acts by trustees and others in reliance on the rule against perpetuities prior to the date the new legislation comes into effect, and confirms judicial decisions based on the rule made prior to that date. Section 5(2) of the Manitoba Act provides:

Where, prior to October 1, 1983,

(a) a court held an interest or a purported interest in property, including successive legal interests, to be void for breach of the rules against perpetuities or the modern rule against perpetuities; or

(b) the period permitted for the vesting of an interest, or for any duration of accumulation, has terminated and any act or step has been taken as a consequence of that termination; or

(c) any act or step was taken in reliance upon the applicability of the rules against perpetuities, or the modern rule against perpetuities or *The Accumulations Act*, including the transfer of property to any person consequent upon any voidity or termination;

the law as it was prior to the passing of this act applies to that purported interest, act or step, as the case may be, as if this act had not been passed.[146]

A similar approach should be adopted in Saskatchewan.

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[145] *Supra*, note 5, s. 19.

[146] *Supra*, note 7, s. 5(2).

VI. APPENDIX

A proposed Act respecting Perpetuities and Accumulations.

Short title

1. This Act may be cited as *The Perpetuities and Accumulations Act*.

The Accumulations Act repealed

2. The Act of the Parliament of the United Kingdom known as *The Accumulations Act*, 1800, and being chapter 98 of 39 & 40 Geo. 3, is repealed insofar as it is part of the law of Saskatchewan.

The rules against perpetuities abolished

3. The rules against perpetuities, also known as the rule in *Whitby* v. *Mitchell* and the modern rule against perpetuities, are no longer part of the law of Saskatchewan.

Application

4.-(1) Except as provided in subsection (2), this Act applies to all interests in real and personal property, including successive legal interests, created before, or on or after [insert date], and to all trusts whether taking effect before on or after that date.

(2) Where, prior to [insert date]:

(a) a court has held an interest or purported interest in property to be void for breach of the rules against perpetuities or *The Accumulations Act*; or

(b) any act, step or transfer of property has been undertaken in reliance upon the applicability of the rules against perpetuities or *The Accumulations Act*;

the law as it was prior to the coming into force of this Act applies to that purported interest, act, step or transfer.

The Crown bound

5. The Crown is bound by this Act.

Repeal

6. Rule 22 of section 45 of *The Queen's Bench Act* is repealed.

Proposed Amendment to The Variation of Trusts Act

1. *The Variation of Trusts Act* is amended by inserting after section 1 the following section:

Interpretation

1.1 In this Act:

(a) "beneficiary" includes a person, corporation, trust, association of persons, and a charitable or non-charitable purpose; and applies whether the benefit in question is a vested or contingent interest, however remote, an annuity or other right charged on an interest or the property of a trust, a general or special power of appointment, any other proprietary right conferred by trust, or a legal future interest, but does not include an interest in real property under an option to purchase.

(b) "trust" includes a special or general power of appointment, and successive legal interests in real property, but does not include an option to purchase real property.